



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 19 2009

Carol A. Laham
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

RE: MUR 5963
Club for Growth Political Action Committee
and Pat Toomey, in his official capacity as Treasurer

Dear Ms. Laham:

On January 24, 2008, the Federal Election Commission notified your clients, referenced above, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On March 11, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Club for Growth Political Action Committee and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2) or 441d. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding(s), is enclosed for your information.

If you have any questions, please contact Tracey Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to be "JMcConnell", is written over the typed name and title.

Julie K. McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Club for Growth Political Action Committee and
Pat Toomey, in his official capacity as Treasurer

MUR: 5963

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by James Braswell alleging violations of the Federal Election Campaign Act of 1971 ("the Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), by Club for Growth Political Action Committee and Pat Toomey, in his official capacity as Treasurer ("Club for Growth PAC").

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

In January 2008, Andrew P. Harris was a candidate in the Republican primary for Maryland's First Congressional District. E.J. Pipkin was also a candidate in the Republican primary. Both were challengers to nine-term incumbent Wayne T. Gilchrest.

According to the complaint, on or about January 11, 2008, Mr. Harris' campaign distributed direct mail literature attacking Mr. Pipkin because he voted for Maryland's annual budget. The heading of the mailer stated, "E.J. Pipkin supported Governor O'Malley's budget" and other text in the mailer stated, "When Republicans said no to Governor O'Malley, Pipkin said yes. He's a reliable vote the governor can count on."

During the week of January 14, 2008, Club for Growth PAC produced \$250,000 in television and radio ads and disseminated the ads across Maryland's First Congressional District. A press release issued by Club for Growth PAC states that the television ad "points out that Mr.

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Gilcrest voted with Nancy Pelosi and liberal Democrats more often than any other Republican House member and the E.J. Pipkin joined the Democrats in voting for Governor Martin O'Malley's massive, big-spending FY 2008 budget." Similarly, the press release states that the radio ad "demonstrates that Gilcrest and Pipkin are pretending to be conservatives, but beneath their masks, they are two economic liberals who side with Pelosi and Governor O'Malley."

The complaint alleges that Club for Growth PAC made the \$250,000 in expenditures for the television and radio ads in coordination with Andy Harris for Congress based on the "choreographed timing" and "virtually identical" negative message of the communications. The only other support offered in the complaint is that the Committee's disclosure reports list thousands of donations with the phrase "Earmarked through Club for Growth PAC" "showing that the two organizations have been linked for several months." Consequently, the complaint argues that Club for Growth PAC violated 2 U.S.C. §§ 441a(a)(2) and 441d by making an excessive in-kind contribution in the form of the ads and failing to include an appropriate disclaimer.

In response to the complaint, Club for Growth PAC asserts that it acted independently with respect to the ads at issue, and submitted an affidavit of the Executive Director of the PAC's connected organization attesting to its assertion. Specifically, Club for Growth PAC states that it had a policy and practice of not coordinating its ads with any candidate, political party, or their agents, and that:

- No person associated with the 2008 Club for Growth PAC ads in Maryland had any conversations with Andy Harris, his campaign, or any of its agents, in which Club for Growth PAC learned about the campaign's plans, projects, activities, or needs or conveyed the possibility that Club for Growth PAC might run independent ads or the particulars of any ads such as the timing or content;
- Club for Growth PAC did not create or disseminate any communications in the 1st District at the suggestion or request of the Harris campaign or of its agents;

- Club for Growth PAC did not seek or receive assent from the Harris campaign or its agents as to any communication in the 1st District;
- Club for Growth PAC did not discuss with, or transfer any information from or to, the Harris campaign or agents regarding any aspect of its communications or its plans, projects, activities, or needs;
- Club for Growth PAC received no information from the campaign or its agents about the timing or content of the Harris mailers referenced in the complaint;
- Club for Growth PAC did not employ any former employee or independent contractor of the Harris campaign;
- Club for Growth PAC did not retain for “purposes of First District communication strategy, production, polling, or media buys any vendor common to the Harris campaign.”

With respect to the alleged similarity between the Club for Growth PAC ads and the Harris campaign mailer, Club for Growth PAC notes that the common content – Harris opponent E.J. Pipkin’s vote for Governor O’Malley’s budget – was a matter of public record. Club for Growth PAC states that the timing of its ads, in relation to the Harris mailers, was coincidental, and that it ran the ads on its own accord just after the holidays, a few days after the other Republican candidates went on the air, and approximately one month before the primary.

Finally, Club for Growth PAC states that the earmarked contributions show no aspect of coordination, but simply show that members of Club for Growth PAC and its connected organization supported Harris.¹

B. Legal Analysis

Under the Federal Election Campaign Act of 1971 as amended (“Act”), no multicandidate political committee, such as Club for Growth PAC, may make a contribution, including an in-kind contribution, to a candidate and his authorized political committee with

¹ To date, the Commission has not received a response from the Andy Harris for Congress Committee.

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respect to any election for Federal office, which, in the aggregate, exceeds \$5,000. 2 U.S.C. § 441a(a)(2), *see* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d)(1). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three part test: (1) payment by a third-party; (2) satisfaction of one of four “content” standards; and (3) satisfaction of one of six “conduct” standards.² *See* 11 C.F.R. § 109.21.

In this matter, the first prong of the coordinated communication test is satisfied because Club for Growth PAC is a third-party payor. The second prong of this test, the content standard, is satisfied because: the ads at issue meet the definition of “public communication” under 11 C.F.R. § 100.26; the ads refer to clearly identified candidates for public office (E.J. Pipkin and Wayne Gilchrest); and the ads appeared within 90 days of the primary election. *See* 11 C.F.R. § 109.21(c)(4).

While the payment and content prongs of the coordinated communications regulations appear to be satisfied in this matter, the conduct prong does not. The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication;

² In *Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties’ motions for summary judgment), the U.S. District Court for the District of Columbia held that the Commission’s content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the common vendor rule. *See Shays v. F.E.C.*, ___ F.3d ___, (D.C. Cir. 2008). This decision does not impact this matter, however, because the communication at issue meets other parts of the content standard which the appellate court did not criticize or invalidate.

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(3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).

The complaint does not allege facts suggesting that the conduct prong was met in this matter, nor does publicly available information support that conclusion. Instead, the complaint asserts that the ads and the Harris Committee's mailer were disseminated around the same time and both referred to E.J. Pipkin's vote as a Maryland State Senator on the governor's budget in 2007, and that the Harris Committee reported thousands of donations in its disclosure reports with the phrase "Earmarked through Club for Growth." Notably, however, the ads at issue and the Harris Committee's mailer were not identical, as the ads were critical of both of Harris' opponents while the mailer referred only to Pipkin. Also, the similar content – Mr. Pipkin's vote on the governor's budget – was available on the public record and there is no information suggesting that the Harris Committee asked Club for Growth to air ads that referenced that material. *See* Herb McMillan, *A time for change; Why I support Andy Harris*, Wash. Times (Dec. 10, 2007). In addition, earmarked contributions often merely reflect that members of the PAC and its connected organization support a particular candidate. Under these circumstances,

the complaint's allegation that the ads at issue were "clearly choreographed" between the Harris Committee and Club for Growth PAC, without additional information, appears to be speculative.

Moreover, Club for Growth PAC has specifically denied facts that would give rise to a conclusion that the conduct prong is satisfied pursuant to 11 C.F.R. § 109.21(d). Namely, Club for Growth PAC has rebutted any implication that the communication at issue was created at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or his agents. Club for Growth PAC also asserts that it did not employ the services of any former employee or independent contractor of the Harris campaign, had no common vendors with the campaign, and did not receive any information about the content of the Harris mailer or its timing from the campaign or its agents. Given these denials, the speculative nature of the complaint, and the absence of any other information suggesting coordination, the conduct prong of the coordinated communications regulations has not been met, and, thus, there appears to be no resulting violations of the Act. Therefore, there is no reason to believe that Club for Growth Political Action Committee and Pat Toomey, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(a)(2) or 441d.